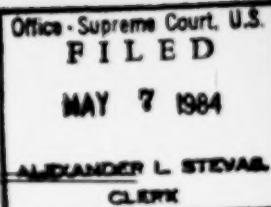


No. 83-592



IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

LORI L. OSTROSKY, JULIANNE OSTROSKY,
and HAROLD C. OSTROSKY,

Appellants

vs.

STATE OF ALASKA,

Appellee

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF ALASKA

REPLY TO BRIEF OF AMICUS CURIAE
AND MOTION TO DISMISS OR AFFIRM

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(i)

QUESTION PRESENTED

Does the State of Alaska's establishment in certain families of perpetual and exclusive commercial fishing rights to publicly owned salmon violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States?

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COMMENTS ON THE BRIEF AMICUS CURIAE

The United States is not a disinterested party in this case. The opinion of Amicus Curiae reflects its desire to protect its own programs which are infected. The Government is concerned with the continued viability of certain aspects of the Magnuson Fisheries Conservation and Management Act, 16 U.S.C., 1801 *et seq.* The Government concedes that its interest is that "there is no constitutional obstacle to implementing the federal law through programs that include the same features as the Alaska scheme in suit." Brief Amicus Curiae, p. 6. Indeed, the Government discloses that the North Pacific Fisheries Management Council created pursuant to the Magnuson Act has already limited commercial salmon fishing in certain fishery conservation zones to those who either hold a valid State of Alaska Limited Entry Permit or who previously operated a fishing vessel in the area, stating that, "the validity of this plan is thus dependent upon the constitutionality of Alaska's scheme." Brief Amicus Curiae, p. 7-8.¹ The significance of Alaska's peculiar creation of gratuitous property rights in a publicly owned resource in favor of those temporarily fortuitous is that this Court's endorsement thereof will insure its imitation.²

The Government concedes that "[A]ppellants are precluded from commercial fishing for salmon from their own boat in

¹ The Mid-Atlantic Regional Council's entry plan in which the permit is linked to vessel ownership apparently operates so as to be functionally the same as "free" transferability. The question presented is already of national scope and effect, contrary to the assertion of Amicus Curiae in footnote 8.

² Amicus Curiae argues that "Alaska's particular permit system is not a prevalent model." Brief Amicus Curiae, p. 12. Affirmance by this Court or dismissal for want of a substantial federal question will cause the Alaska system to become the national model. Its contagious quality has been demonstrated by Amicus Curiae.

Bristol Bay unless they purchase or inherit a permit or receive one as a gift." Brief Amicus Curiae, p. 4.³

This case does not end with a discussion of fishing policies however. Fish are a naturally occurring publicly owned resource. Oil, natural gas, and timber are other publicly owned naturally occurring resources, both renewable and non-renewable. If Alaska is able to give away its publicly owned salmon to those and their heirs who fortuitously were commercial users at the right time, then the Washington Legislature can give away its publicly owned timber in perpetuity to those concerns which presently control it; Texas, its publicly owned oil; and Louisiana, its publicly owned natural gas. A feudal system of public resource ownership will be created in this country with access gained only by birthright.

Amicus Curiae argues that a non-permit holder may nonetheless still work as a deck hand on a vessel controlled by a permit holder. So will a non-owner of Texas oil be able to rough neck on a drilling rig and a non-owner of Washington timber be able to buck logs. The only hope all will have of rising above their caste is if they are able to amass enough money and find a willing seller to buy their way into the privileges inherited by those families who have been bestowed with the State's publicly owned bounty.

Amicus Curiae maintains that such resource allocation decisions both by the State and Federal governments are the type of decisions that must be subject to the "least intrusive" standards of judicial review. Brief Amicus Curiae, p. 9. Appellants have suggested that the rational relationship test is not appropriate to this Court's historical interest in the protection of the *opportunity* to fish. *Idaho Ex Rel Evans v. Oregon*, *infra*. However, even applying the rational relationship test, it is impossible to conceive of any legitimate conservation justification in giving a public resource to a fortuitous

³ Amicus Curiae asserts in n. 8 that "[T]he scheme is not even prevalent in Alaska." Salmon is the most valuable fishery in Alaska. For a century Bristol Bay has produced the most bounteous commercial salmon runs in the world.

few in perpetuity, particularly when one of the purported purposes thereof is to avoid "unjust discrimination." The Government acknowledges that "the State created free market system [assures] that both fishermen and their *families will be taken care of* in case of death or disability. Brief Amicus Curiae, p. 12. It is not explained how choosing certain families for the bestowing of an interest in a publicly owned resource so that they "*will be taken care of*" to the exclusion of all others who have an equal interest in the resource is a constitutionally justifiable phenomenon. The only case that is discussed in support of this peculiar proposition is *Kotch v. Board of River Port Pilot Commissioners for the Port of New Orleans, et al.*, 330 U.S. 552 (1947), wherein this Court upheld a program by which state river and harbor vessel pilots were required to participate in a six-month apprenticeship and those selected as apprentices were only relatives and friends of the incumbents. The case did not deal with the giving away of an extremely valuable publicly owned naturally occurring resource to certain pilots and their families in perpetuity. Indeed, the Court specifically noted, "And an important factor in our consideration is that this case tests the right and power of a state to select its own agents and officers". 330 U.S. at 557. The Court concluded, "Thus in Louisiana, as elsewhere, it seems to have been accepted at an early date that in pilotage, unlike other occupations, competition for appointment, for the opportunity to serve particular ships and for fees, adversely affects the public interest in pilotage." 330 U.S. at 561, noting that "[T]he number of people, as a practical matter, who can be pilots is very limited." 332 U.S. 563.⁴

Significantly, Justice Rutledge noted in his dissent:
 The result of the decision therefore is to approve as constitutional state regulations which makes admission to the ranks of pilots turn finally on consanguinity.

⁴ The majority also stated: "Probably in pilotage more than in any other occupation in the United States the male members of a family follow the same work from generation to generation." 330 U.S. 562.

Blood is, in effect, made the crux of selection. That, in my opinion, is forbidden by the Fourteenth Amendment's guaranty against denial of the equal protection of the laws. The door is thereby closed to all not having blood relationship to presently licensed pilots. Whether the occupation is considered as having the status of "public officer" or of highly regulated private employment, it is beyond legislative power to make entrance to it turn upon such a criterion. The Amendment makes no exception from its prohibitions against state action on account of the fact that public rather than private employment is affected by the forbidden discriminations. That fact simply makes violation all the more clear where those discriminations are shown to exist.

330 U.S. at 565.

The only other case even cited in support of the Government's premise that it is legitimate for a state to select certain families to be taken care of with a publicly owned resource is *Williamson v. Lee Optical*, 348 U.S. 483 (1955), wherein this Court upheld the provisions of an Oklahoma statute making it unlawful for any person not a licensed optometrist or ophthalmologist to fit lenses or to duplicate or replace lenses or other optical appliances except upon prescriptive authority of a licensed ophthalmologist or optometrist. The applicability of this case to the facts at bar is unclear.

COMMENTS ON THE MOTION TO DISMISS OR AFFIRM

Packaging is sometimes more important than the merits of a product for marketability. The State repeatedly asserts to the effect that:

The Ostroskys are not correct, however, in asserting that the State has violated the Constitution by making entry permits freely transferable.

Motion to Dismiss or Affirm, p. 20. If ever there was an ironic misnomer, it is referring to Alaska's limited entry permits as being "freely transferable." A permit is free only when it is

inherited. It is not free to those not the beneficiaries of a bequest or who do not have the money to buy a permit.

Appellant Harold C. Ostrosky may at one time have qualified for a permit. He chose not to participate in a system that he believed to be unconstitutional.⁵ He chose to contest a system that vested the right to a traditionally publicly owned resource in the hands of an exclusive few in perpetuity. Appellants Lori and Julianne Ostrosky unquestionably never qualified for a Limited Entry Permit.

The State asserts that the rational justifications for the Limited Entry Act are essentially three-fold: to prevent economic distress to those dependent upon commercial fishing; to conserve the fisheries; and to avoid unjust discrimination in the allocation of limited entry permits. The State asserts, "making permits freely transferable also furthers the purpose of avoiding unjust discrimination in the allocation of the permits because all persons have an equal opportunity to purchase or receive permits from those who have them." Motion to Dismiss or Affirm, p. 37. The only persons who have an equal opportunity to purchase are those with a great deal of money.⁶ The only persons who have an opportunity to receive permits are those who belong to the right families. The State argues that "free" transferability prevents a closed class of persons from holding the permits. Motion to Dismiss or Affirm, at p. 38. The only persons who have access to the property of the class of persons holding the permits are those with money or those that belong to the families of the owner. "Free" transferability is definitionally unjust discrimination by its creation of a closed class of persons to the exclusion of all others from even the *opportunity* for access to a publicly owned

⁵ The record below is silent on this issue save for Appendix "A" to the State's Motion to Dismiss or Affirm.

⁶ It has been reported that a recent sale of a Limited Entry Permit in the Chignik Lagoon area on the Alaska Peninsula was for \$375,000. State records of these sales are confidential.

resource.⁷ The existence of loan programs for Permits only underlines the disparate treatment. Loan programs must be funded, loans qualified for, and loans paid back with interest. The original issuees and their heirs do not have to borrow or pay back. The loan program also has a two-year durational residency requirement which in itself violates the Fourteenth Amendment. *Zobel v. Williams*, 475 U.S. 55 (1982).

"Prevention of economic distress to those dependent upon commercial fishing" translates to mean protection of only those families who were fishing at the time of the implementation of the Act. It is not necessary to discriminate against subsequent arrivals who do not belong to the right families or who do not have adequate money in order to conserve fisheries. "Free" transferability has no relationship to conservation. Appellants are not asserting that the State does not have the power to limit access to fisheries for conservation purposes. Appellants are asserting that any such limitation of access must be done on a democratic basis consistent with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The State asserts, notwithstanding that Appellants cannot fish commercially, Appellants retain the separate but equal right to fish for subsistence or sport or work as a deck hand on the vessel of a Permit holder. A law clerk who is forever relegated to that status with no opportunity to obtain a license to practice law unless he accumulates sufficient money to buy in and finds a willing seller is not separate but equal to another law clerk who will simply inherit a license to practice law.⁸

⁷ The State suggests that "only" salmon and herring fisheries are affected. These are the most valuable fisheries in Alaska.

⁸ The State suggests that another justification for Limited Entry is that if the owner of a Permit has an economic stake, the fisherman will be more likely to conserve. There is no evidence for this either in logic or the record. Indeed, such a financial investment may only encourage exploitation in order to maximize profit to pay for a Permit. It is not necessary for an attorney to have purchased a bar certificate for \$100,000 in order to show respect for the courts.

While directly at issue is the "free" transferability provision of the Limited Entry Act, the entire Limited Entry Act is inseparable from the transferability provisions. The original issuing criteria are inextricably intertwined with transferability. The fact that it is the original issuing persons whose families retain the permits by operation of law unless they decide to sell necessarily brings into question the method and manner of the original issuance.

This Court has long recognized that the *opportunity* to fish is an interest of sufficient dignity and importance to warrant certain protections. In the prologue to the three-justice dissent in *Idaho Ex Rel Evans v. Oregon*, _____ U.S. _____ (No. 67. ORIG. 6-23-83), Justice O'Connor noted:

The Master properly concluded that "Idaho is entitled to its fair share of the fish." *Id.*, at 25. No one owns an individual fish until he reduces that fish to possession, *Pierson v. Post*, 2 Am. Dec. 264 (N.Y. 1805), and indeed, even the States do not have full-fledged "property" interests in the wildlife within their boundaries, see, e.g., *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284, 97 S. Ct., 1740, 1751, 52 L.Ed. 2d 304 (1977); *Missouri v. Holland*, 252 U.S. 416, 434, 40 S. Ct. 382, 384, 64 L.Ed. 641 (1929). Nonetheless, courts have long recognized the *opportunity* to fish as an interest of sufficient dignity and importance to warrant certain protections. See, e.g., *Union Oil Co. v. Oppen*, 501 F.2d 558 (CA9 1974); *Louisiana ex rel. Guste v. M/V Testbank*, 524 F.Supp. 1170 (E.D. La. 1981); *Weld v. Hornby*, 7 East 195 (K.B. 1806); J. Gould, *Law of Waters* §§ 186, 187 (1883); 3 J. Kent, *Commentaries* 411 (5th ed. 1844); cf. *New Jersey v. New York*, 283 U.S. 336, 345, 51 S. Ct. 478, 480, 75 L.Ed. 1104 (1931) (considering the effect on oyster beds in apportioning water); *Douglas*, *supra* at 267-268, 97 S.Ct., at 1742-1743 (REHNQUIST, J., concurring in part and dissenting in part) (although State has no ownership in wildlife in the conventional sense, it has a "substantial proprietary interest"). See generally *United States*

v. Washington, 520 F.2d 676 (CA9 1975), cert. denied, 424 U.S. 978, 96 S. Ct. 1487, 47 L.Ed.2d 750 (1976). Indeed, in recent years, as the runs of anadromous fish have diminished and no longer satisfy fully the demands of all fishermen, the federal courts frequently find themselves confronted with disputes over the management and conservation of the resource. Faced with these problems, the courts, including this Court, have not hesitated to recognize that various claimants do possess protectible rights in the runs of fish, whether or not those claimants ultimately manage to land and reduce particular specimens to possession and full ownership. See, e.g., Washington Game Department v. Puyallup Tribe, 414 U.S. 44, 94 S.Ct. 330, 38 L.Ed.2d 254 (1973); Sohapp v. Smith, 529 F.2d 570 (CA9 1976) (per curiam); United States v. Washington, *supra*; Sohapp v. Smith, 302 F.Supp. 899 (Or. 1969).

(Emphasis in original).

There have been several decisions of the Supreme Court of the State of Alaska relating to Limited Entry since the *Ostrosky* decision now before this Court. In *Timperley v. Jeffries*, Opinion No. 2765, Dec. 16, 1983, the Alaska Supreme Court held that when a limited entry permit passes through an estate to an heir it cannot be attached by creditors. The Court specifically found that it was "not persuaded" that allowing transfer for a single heir free of creditor's claims denies equal protection either to multiple heirs of a deceased permit holder or to estates not in possession of limited entry permits. Footnote 4 of the Opinion notes that the Court had rejected "similar constitutional objections to the limited entry act transferability provisions" in *State v. Ostrosky*. Alaska has given away a valuable public resource of fish to a selected few and their lineal descendants free from even creditor's claims.

In *Commercial Fisheries Entry Commission, State of Alaska v. Apokedak*, Opinion No. 2794, March 2, 1984, Justice Dimond dissenting, the Alaska Supreme Court held that the actual legal partner of a gear license holder fishing as of the cutoff date did not qualify for a Limited Entry Permit. The

Court found that exclusion of this partner was not "unjust discrimination."

In *David E. Nash v. State of Alaska*, Opinion No. 2802, March 23, 1984, the Alaska Supreme Court restated that in order to be eligible for the original issuance of a Limited Entry Permit the applicant must have been a past participant in the fishery and held a gear license.

Finally, in *Wik v. Ruyder*, Opinion No. 2822, April 10, 1984, the Alaska Supreme Court held that Limited Entry Permits are to be treated as ordinary personal property for inheritance purposes.

CONCLUSION

Comparisons have been attempted with Alaska's Limited Entry. It has been suggested that the Homestead Act wherein public lands were given away might be comparable. This comparison is not apt as all persons had equal access to public land if they were willing to go out and homestead. Here, the only persons who were given access to the permits were those who were already fishing. Fish are also a renewable natural resource, not a finite one such as land in which private ownership is a basic premise of the country.

Alaska Limited Entry is also distinguishable from oil leases as such leases are sold for value and the public at large gains benefit from the income derived thereby. Anyone can bid on an oil lease. It is necessary to sell such a public asset as the costs of development are high and it would be impractical to allow the public at large general access to a pool of oil underground. Oil is also not renewable.

Alaska Limited Entry is distinguishable from government timber sales. Timber is sold for value and the public at large realizes a benefit thereby. Timber is not given away to a lucky few and their heirs in perpetuity to the exclusion of others with an equal interest. It is necessary to sell timber as it is impractical to allow individuals commercial access. Significant investment is needed to be able to process timber. This is in stark contrast with fishing. Indeed, in the Bristol Bay salmon fishery

boats are limited to a maximum length of 32 feet. 5 AAC 06.341.

A comparison to a public utility franchise is not appropriate. A public utility is a necessary monopoly occasioned by the scope and circumstances of its operations. In such instances it has been determined that it is impossible to provide services without a protected and regulated monopoly. This is not true of commercial fishing in small boats. Even if it is necessary to limit the number of boats fishing it does not follow that it is necessary to give the right to fish only to certain families in perpetuity.

Limited Entry is not the first attempt by a State to monopolize a public resource into the hands of a privileged few. This Court's explicit or tacit approval thereof would insure that it will not be the last. The question presented raises substantial issues of admittedly national scope that require plenary consideration by this Court.

DATED this 4th day of May, 1984, at Anchorage, Alaska.

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